

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
KANSAS CITY, KANSAS**

MEDICAL SUPPLY CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 05-2299-KHV
NOVATION, LLC	)	Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	)	Attorney Lien
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
<i>Defendants.</i>	)	

**And**

MEDICAL SUPPLY CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
vs.	)	Case No. 03-2324-CM
	)	
JEFFREY R. IMMELT	)	
GENERAL ELECTRIC COMPANY	)	
GENERAL ELECTRIC CAPITAL BUSINESS	)	
ASSET FUNDING CORPORATION	)	
GE TRANSPORTATION SYSTEMS GLOBAL	)	
SIGNALING, L.L.C.	)	
<i>Defendants.</i>	)	

**MOTION TO REQUIRE CONSOLIDATION ARGUMENTS TO BE IN THE FORM OF  
PLEADINGS ON THE RECORD AND NOTICE OF THREAT OF UNLAWFUL SANCTIONS**

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned Motion To Require Consolidation Arguments To Be In The Form Of Pleadings On The Record And Notice Of Threat Of Unlawful Sanctions. Medical Supply seeks to have all issues regarding consolidations of actions raised in pleadings instead of a defendants' letter to the court incorrectly stating the controlling law of our circuit. Medical Supply also seeks to provide the court notice of yet another threat of unlawful sanction made to intimidate Medical Supply and its counsel into withdrawing valid state and federal law claims.

## STATEMENT OF FACTS

1. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. sent a letter to the court misstating the law of our circuit in an effort to prejudice Medical Supply's right to consolidate its actions and further amend its claims.
2. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. did not object to consolidating the two actions.
3. As a letter instead of a motion with a memorandum of law, the court and Medical Supply are both hindered in addressing the defendants' assertions.
4. On Wednesday, August 24<sup>th</sup>, Jonathan L. Glecken lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. , threatened Medical Supply's counsel with the loss of his home if he did not withdraw Medical Supply's claims.
5. Jonathan L. Glecken was unaware that the defendants' cartel had already injured Medical Supply's counsel by causing him to lose his house as part of numerous informal sanctions in retaliation for representing Medical Supply in seeking redress from the cartel's repeated refusals to deal and other antitrust prohibited acts in the hospital supply market.
6. The Tenth Circuit decision awarding sanctions for Medical Supply's claims against defendants Jeffrey R. Immelt because the complaint did not allege Jeffrey R. Immelt personally knew General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C's conduct according to plans instructions the complaint alleges Jeffrey R. Immelt personally ordered to prevent web based hospital supply distributors using Medical Supply Chain, Inc. is clearly in error factually and at law.
7. US law jurisdictions provide Medical Supply standing for seeking relief under Antitrust and RICO claims against defendants who were the *proximate* cause of Medical Supply's injuries. Hon. Judge Lucero knew and is responsible for knowing that the sanction order against Medical Supply is unlawful.

8. Medical Supply adequately pled that Jeffery Immelt is an antitrust “person” capable of intraenterprise and interenterprise conspiracy because of the complaint’s averment of a substantial self interest as the president of GE Medical, an unnamed defendant legal entity. Paragraph 5 of the Amended Complaint, Exhibit 2 states:

“Jeffrey R. Immelt, Chief Executive Officer, General Electric Company (herein “GE”). Mr. Immelt has been a long time employee of the many divisions and entities of General Electric Company. In 1997 Mr. Immelt was made president of GE Medical, the subsidiary corporation owned and controlled by GE responsible for selling products to the healthcare industry. In or about 1998 GE directed Immelt to identify the form of internet business model that would be a threat to GE Medical’s profit margin. Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical’s healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market. As part of that strategy, Immelt spent \$50,000,000.00 in 1999 on web site, database and internet communications technologies.”

9. Medical Supply adequately pled that Jeffery Immelt’s conduct intentionally and foreseeably injured web based hospital supply distributors including Medical Supply Paragraph 6 of the Amended Complaint, Exhibit 1 states:

“The second part of the strategy Immelt developed and implemented under the direction of GE was to organize GE Medical’s competitors and combine with them to create a preemptive internet marketplace where prices could be protected from competitive pressure caused by new market entrants and market shares could be preserved by the assignment of territories and the allotment of product markets. Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See *United States v. Andreas*, 216 F.3d 645 (7th Cir., 2000).”

10. Medical Supply adequately pled that Jeffery Immelt’s conduct intentionally created an integrated enterprise or joint venture with his competitors as a conspiracy to restrain trade. Paragraph 7 of the Amended Complaint, Exhibit 1 states:

“7. Mr. Immelt signed and oversaw the preparation of documents incorporating the conspiracy as Global Health Exchange, LLC in 2000. Mr. Immelt oversaw GE’s capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE’s control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors.”

11. Medical Supply adequately pled that Jeffery Immelt’s conduct was intentionally unlawful. Paragraph 8 of the Amended Complaint, Exhibit 1 states:

“8. Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is

causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies."

12. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally targeted at consumers in the market for hospital supplies and intentionally targeted at the specific consumer Medicare.

Paragraph 9 of the Amended Complaint, Exhibit 1 states:

"9. Mr. Immelt knew the decreased access to healthcare resulting from the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death."

13. Medical Supply adequately pled that Jeffery Immelt's conduct included intentionally forming a conspiracy, combination and cartel with competitors including Neofarma, Inc. to control 80% of the hospital supply market and maintain high prices through intentional monopolization. Paragraph 10 of the

Amended Complaint, Exhibit 1 states:

"10. Mr. Immelt became CEO of The General Electric Company in September 2001. Under Immelt's leadership, GE's Global Exchange's inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies. Immelt also expanded the membership to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation's hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies. Immelt allied GHX, LLC with the other internet marketplace, Neofarma, Inc. to control 80% of the existing hospital supply e-commerce market. Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neofarma and GHX, LLC.'s internet marketplaces. See Attachment 2, Marketplace @Novation, Master Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices."

14. Medical Supply adequately pled that Jeffery Immelt knew his conduct increasing the costs of hospital supplies was the proximate cause of injury to American working families in the market for healthcare. Paragraph 11 of the Amended Complaint, Exhibit 1 states:

"11. Mr. Immelt knew the gravamen of his actions when the trade unions of GE held a two day, nationwide strike on January 14 th, 2003 to call attention to the high cost of healthcare and the rapid price increases for American working families. This effort to call public attention to the crisis cost the life of a GE worker. Kjeston Michelle Rodgers, a member of IUE-CWA Local 83761, was hit by a police car and killed while on the picket line."

15. Medical Supply adequately pled that Jeffery Immelt's conduct is a felony under federal law:

Paragraph 12 of the Amended Complaint, Exhibit 1 states:

"12. Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious

conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708.”

16. Medical Supply adequately pled that Jeffery Immelt’s was personally responsible for GE’s antitrust prohibited conduct as a matter of federal law under the Sarbanes-Oxley Act of 2002, an issue neither the trial or appellate courts addressed. Paragraph 12 of the Amended Complaint, Exhibit 1 states:

“13. As CEO, under the Sarbanes-Oxley Act of 2002 Mr. Immelt is responsible for putting in place antitrust compliance procedures. Mr. Immelt failed to stop GE’s pernicious antitrust misconduct of price fixing, group boycott refusals to deal and customer allotment, endangering the investment of the corporation’s stock holders and injuring the public by preventing competition and efficient delivery of hospital supplies. Mr. Immelt allowed his authority to be used to command GE corporate, its capital and transportation subsidiaries to repudiate a contract designed to capitalize Medical Supply Chain, Inc.’s entry into the hospital supply market to prevent Medical Supply from introducing competition and efficiency into that market.”

17. A plaintiff need only allege an antitrust defendant or Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 defendants’ conduct was the proximate cause of injury to consumers in the market (antitrust) or injury to the plaintiff’s business (RICO).

18. The difference between this appellate panel’s sanction order that remands the action back to the trial court and the earlier *sua sponte* sanctions against Medical Supply for appealing what the panel admitted was a mistake of law by the trial court demonstrates an awareness that this new sanction is unlawful. The earlier sanction has been docketed in the US Supreme Court as *Bret D. Landrith v. US S Bancorp NA et al* Case No. 05-5503.

19. The earlier appellate panel memorandum and order in *Medical Supply v US Bancorp NA et al* made no independent finding of law or fact and upheld the trial court’s facially erroneous conclusions of law including the express affirming of the error that the USA PATRIOT Act provides no private rights of action when the statute expressly provides several.

20. The panel’s memorandum and order of sanctions in *Medical Supply v GE et al* originates not from documents in the case record of that action but from a motion to dismiss and suggestion in support filed in *Medical Supply v Novation et al* on behalf of the defendant Robert J. Zollars, The CEO Of Neoforma, Inc. also a defendant in *Medical Supply v Novation et al* and alleged to be a GE coconspirator in the *Medical Supply v GE* complaint. See reference to attached contract *infra*.

21. The documents were accessed on the Medical Supply Chain, Inc. web site, [www.medicalsupplychain.com](http://www.medicalsupplychain.com). While informative to many law firms and law clerks and arguably

applicable to Robert J. Zollars given his counsel's informative service of process arguments, the antitrust "person" argument was irrelevant to Jeffery Immelt who did not contest service or status as an antitrust "person." In *Medical Supply v GE et al*, the Robert J. Zollars documents were material e

22. The Tenth Circuit's memorandum and order upholding in part and reversing in part the trial court's ruling in *Medical Supply v GE et al* is being prepared for US Supreme Court review to address the fact *Medical Supply* did adequately plead Sherman Act antitrust claims against all defendants.

23. *Medical Supply's* sole question in its petition:

"Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products";

has already been granted certiorari by the US Supreme Court on June 27<sup>th</sup>, 2005 in *Texaco, Inc. v. Fouad N. Dagher, et al.*, No. 04-805, and *Shell Oil Company v. Fouad N. Dagher, et al.*, No. 04-814, petitions for writ of certiorari to the U.S. Court of Appeals for the 9th Circuit.

#### **MEMORANDUM OF LAW**

The defendants' letter describing the jurisdiction of trial courts in this jurisdiction upon a directed remand is erroneous. The GE defendants' letter to Judge Murguia incorrectly stated the applicable law governing the trial court's jurisdiction on remand. As a letter to the court instead of a motion addressed to all parties, the errors of the legal assertions cannot be adequately addressed.

The GE defendants are mistaken in that the trial jurisdiction after the appellate mandate was altered by *Medical Supply's* motion to combine the GE and Novation actions. The Tenth Circuit has recently illustrated the effect of a Rule 21 motion to add parties is made after a remand mandate to dismiss claims in a dispositive motion has been made in trial court. In footnote 2 of *Thompson v. State of Colorado*, 2003 C10 279 (USCA10, 2003), the Tenth Circuit described Rule 21 even in a post remand context

"\*fn2 Rule 21 provides that "[p]arties may be . . . added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Resort to Rule 21 is appropriate where, as in this case, "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U. S. 826, 836 (1989)."

The Tenth Circuit stated a non-general mandate directing dismissal does not prevent the trial court from continuing to apply the law based on the new amended complaint:

"All the mandate required was that the district court grant summary judgment to the State on the issue of sovereign immunity and dismiss it as a defendant. It would not be contrary to the mandate

to allow plaintiffs to amend their complaint or, alternatively, to add Mr. Fisher in his official capacity as a defendant pursuant to Federal Rule of Civil Procedure 21 \*fn2 , before doing so.”

*Thompson v. State of Colorado*, 2003 C10 279 at ¶23 (USCA10, 2003).

The assertion made by the GE defendants in their letter to Judge Murguia is entirely erroneous. The defendants in *Thompson* argued the mandate rule requires a district court to "comply strictly with the mandate rendered by the reviewing court." from *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (holding that district court had no authority to grant motion for appeal-related fees after appellate court had expressly denied motion for those fees) (quotation omitted). However the Tenth Circuit took into account the issues related to the plaintiff's post remand amendment were like those in Medical Supply's post remand consolidation, issues including racketeering and later antitrust prohibited conduct to fix prices that were expressly not ruled on by the appellate court or never considered by the trial or appellate courts.

“Further, in *Huffman*, we ruled on the merits of the motion for appellate fees, see *id.*, while, here, we simply refused to exercise our discretion in part because of the procedural posture of the case.”

*Thompson v. State of Colorado*, 2003 C10 279 at ¶21 (USCA10, 2003). The *Thompso* court went on to elaborate:

“We recently re-emphasized that, while a district court is "bound to follow the mandate, and the mandate 'controls all matters within its scope, . . . a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.'" *Procter & Gamble Co. v. Haugen*, \_\_\_ F.3d \_\_\_, \_\_\_, 2003 WL 103011, at \*3 (10th Cir. Jan 6, 2003) (quoting *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986). In declining to exercise our discretion to allow amendment, we did not preclude the district court from exercising its discretion to do so on remand. To the contrary, we noted that plaintiffs had neither "alleged nor shown that denial of the motion results in an advantage lost by the Plaintiffs or disadvantage incurred." *Thompson*, 278 F.3d at 1025 n.2. In other words, we refused plaintiffs' request in part because our denial of the motion to amend would not be to plaintiffs' ultimate detriment or prejudice them after remand.”

*Thompson v. State of Colorado*, 2003 C10 279 at ¶22 (USCA10, 2003). The *Thompson* court stated an observation that fits Medical Supply's consolidation motion which by combining the averments of both cases adds parties and states viable claims against all defendants:“If we were to now foreclose the district court from considering a motion to amend on its merits, plaintiffs would be unfairly disadvantaged in a way clearly not contemplated by, and contrary to the express language of, the mandate.”

No law of the case doctrine as a corollary to the mandate rule prevents Medical Supply's combined claims which now subject the GE defendants including Jeffrey Immelt to new theories of law from being viable:

“Furthermore, it was unnecessary for the district court to declare any previous findings clearly erroneous under Fed.R.Civ.P. 52(a) when undertaking the task of making findings to address a totally new theory of law. See, e.g., *Holsey v. Armour & Co.*, 743 F.2d 199, 204 (4th Cir.1984) (in Title VII suit the district court complied with appellate court mandate when, after hearing from the parties, it exercised independent judgment and reconsidered findings of fact and conclusions of law in light of an intervening Supreme Court decision), cert. denied, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784 (1985).”

*Hicks v. Gates Rubber Co.*, 928 F.2d 966 at 971 (C.A.10 (Colo.), 1991). One such intervening appellate court decision studiously ignored by the Tenth Circuit panel though raised in the answer brief is the reversal of an antitrust dismissal is the 9<sup>th</sup> Circuit’s reversal in *Dahger v. Motiva Enterprises*, 02-56509-intervening law.

The mandate upholding the dismissal of the earlier GE complaint cannot be useful guidance as law of the case when it addressed the lack of an alleged conspiracy between legally independent actors (that was clearly erroneous on the facts pled in the complaint) when Medical Supply’s combined claims now clearly aver the GE defendants conspiracy with legally independent antitrust and RICO defendants in claims based on subsequent conduct never before the trial court in the earlier action. Similarly, the fact that the mandate upholds a dismissal on the pleadings where discovery was never permitted makes the mandate meaningless from a law of the case standpoint:

“see *Barber v. International Bth'd of Boilermakers*, 841 F.2d 1067, 1071 (11th Cir. 1988) (“As should be apparent, the application of these mandate rule principles will . . . depend considerably on the stage a case has reached when it goes up on appeal and on the language of the appellate court's mandate and/or opinion.”); see generally, 18 J. Moore et al., *Moore's Federal Practice* ¶ 134.23 (3d ed. 2002) (discussing the relationship between the law of the case and the mandate rule).”

*Procter & Gamble Company v. Haugen*, 2003 C10 17 at ¶ 27 (USCA10, 2003).

Averments Supporting federal causes of action were not addressed in the dismissed GE action. The trial and appellate court expressly declined to make findings of fact or law regarding a nascent federal False Claims Act cause of action and on averments related to the state law based claims.

A state law claim in Count 14, paragraph 51 of Medical Supply’s Amended Complaint against the GE Defendants ( Exhibit 1 on page 31 and 32 contained the averment of a federal law based Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 predicate act, a violation of 18 U.S.C. § 1503 Obstruction of Justice in conspiracy with the US Bancorp NA (NYSE USB) defendants that was expressly not ruled on by the trial court, a decision that was affirmed by the appellate panel.

“Count 14, Bad Faith: The defendants have refused to cooperate in determining if the contract sought to be enforced had been repudiated. The corporate counsel for each of the defendant entities

have received the antitrust implications of their GE's conduct and the antitrust harm that will be inflicted upon Medical Supply by the denial of the essential facility of financing that is the bargain obtained by Medical Supply in the contract. GE's counsel answered the plaintiff's Nelson v. Miller notice by denying without justification in fact or law the claims of the plaintiff. **The defendants' cartel members in a previous attack on Medical Supply to prevent market entry utilized a frivolous defense to delay Medical Supply's access to discovery, intimidate victims and witnesses through an effort to cut off all resources to the company during the litigation in an effort to prevent the plaintiff from testifying and seeking redress in a prima facie violation of 18 U.S.C. § 1503 Obstruction of Justice. GE and its subsidiaries have retained outside counsel that repeatedly threatened the plaintiff and has misrepresented the facts and applicable case law regarding this case in a letter dated June 13th, litigating defenses to enforcement that are without merit.** As a lender, the defendants can be found to be liable litigating defenses to enforcement that are without merit under Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551 (1985) [bank liable for "stonewalling" assertion of an invalid defense to customer's lawsuit]" [emphasis added]

Medical Supply Amended Complaint against Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. The complaint made allegations of fact supporting this averment that the defendants had violated a federal criminal statute that is a predicate act for a RICO claim.

"14. When Medical Supply Chain, Inc. prepared to seek redress in court for its injury, Mr. Immelt through his agents caused Medical Supply Chain, Inc., a victim of **GE's deliberate actions to be threatened and intimidated in conduct equivalent to the felony of 18 U.S.C. § 1503 Obstruction of Justice with the intent of preventing Medical Supply Chain, Inc. and its counsel from bringing these charges and to cause them to be withdrawn.** By deliberately refusing to cite any authority, case law or statute that Medical Supply's claims were invalid or frivolous, Mr. Immelt through his agents attempted to make GE's victims believe that **they would be sanctioned and fined not on the basis of law but on GE's power over the legal system.**" [emphasis added]

Medical Supply v GE *et al* Exb. 1 Paragraph 14, page 32. As the Medical Supply v Novation *et al* complaint alleges, Medical Supply did not become aware that the defendants cartel was committing a pattern and practice of racketeering acts against Medical Supply until Magistrate James O'Hara testified:

"Plaintiff could not have reasonably discovered its injuries, or that its injuries were wrongfully caused, until January 21st, 2005, when Shughart Thomson & Kilroy's former managing partner testified under oath in the Kansas Attorney Disciplinary Prosecution of the plaintiff's counsel."

Medical Supply v Novation *et al* complaint Exb. 2 Paragraph 613, page 114. Our circuit's pattern discovery rule dictates that Medical Supply's RICO claims were not ripe until January 21st, 2005 and like the memorandum and order in Medical Supply v US Bancorp NA *et al*, the trial court in Medical Supply v GE *et al* expressly did not address the claims based on state law prohibited conduct that Medical Supply later discovered RICO 18 U.S.C. § 1962 predicate acts committed by the defendants in a continuing conspiracy

to eliminate competition in the hospital supply market as part of a scheme to defraud government health insurance through false claims made to Medicare, Medicaid and Champus.

Despite Medical Supply's action being remanded for sanctions, the GE defendants are still under jurisdiction of this court. The Medical Supply v Novation *et al* complaint which avers subsequent federal antitrust<sup>1</sup> and RICO and state law claims against the GE Defendants was served on their counsel when Medical Supply made its motion to consolidate the two actions.

Because the controlling law of our circuit is significantly contrary to the GE defendants assertion in their letter to Judge Murguia regarding the consolidation of both actions, Medical Supply respectfully requests the court disregard the legal assertions in the letter and require the parties to address in pleadings properly before the court any objections to the court's jurisdiction on remand in light of Medical Supply's post remand motion to consolidate.

#### **THE UNLAWFULNESS OF THE GE DEFENDANTS' THREATENED SANCTIONS**

The Tenth Circuit panel decisions have been replete with error. The decisions have not been published (because they are unpublishably erroneous) and are expressly nonbinding. The decision to sanction Medical Supply again is however is of a degree of error that appears to transcend mistake. In seeking to use this decision to justify sanctioning the plaintiff or its counsel, and to encourage the trial court not to grant Medical Supply discovery and the right to present evidence against the defendants even on claims and issues the trial court and Tenth Circuit expressly declined to consider, the defendants are participating in actionable conduct against Medical Supply.

#### **The Jeffrey Immelt Sanction Is Overtly Unlawful**

The defense counsel know or should have known that antitrust standing is not tort law based as stated in the Tenth Circuit's openly erroneous reversal of the trial court's decision not to sanction Medical Supply.

“Although often applicable to a single dispute, tort and antitrust causes of action require widely divergent proofs. Moreover, these causes of action vindicate widely differing policies; the first is wholly personal to the plaintiff-competitor and the second requires the plaintiff to demonstrate harm to competition at large and antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, 97 S.Ct. 690, 696, 50 L.Ed.2d 701 (1977).”

*Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 at 187 (C.A.3 (N.J.), 1992).

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<sup>1</sup> Sherman 1 price fixing is actionable again for subsequent transactions.

There can be no non frivolous argument that Jeffrey Immelt is not properly a defendant in Medical Supply's antitrust action. The facts describe his intentional conduct to violate the antitrust laws and his knowledge of the injury to consumers in the market, including Medicare from the cartel's artificially inflated costs. The complaint alleges that Jeffrey Immelt knew the injury and death resulting from his restraint of trade. The complaint describes Jeffrey Immelt's creation of the agreement to restrain trade in a combination with GE's competitors. The complaint alleged that Jeffrey Immelt's motive was to prevent a web based hospital supply distributor from competing with GE and thereby causing prices to fall. Title 15, Chapter 1 § 24 of the Sherman Act entitled "Liability of directors and agents of corporation" expressly makes corporate officers responsible when their companies violate Sherman 1 as Medical Supply has alleged GE has done.

**Jeffrey Immelt Has An Independent Personal Stake Making Him Liable Under RICO And Antitrust Law For Subsequent Price Fixing And Restraint of Trade In the Hospital Supply Market**

The defense counsel knew or should have known that Jeffery Immelt alleged to be the President of GE Medical and then the CEO of General Electric in addition to founding GHX, Inc. is an actor with an independent personal stake. The majority of jurisdictions recognize an "independent personal stake" exception, holding that corporate officers or employees can conspire with the corporation when they act in their own interest and stand to benefit personally from the conspiracy. See, *e.g.*, *Fraser v. Major League Soccer*, 97 F. Supp. 2d. 130, 136 (D. Mass. 2000). Jeffrey Immelt is clearly alleged to have an independent personal stake as a principal of more than one legally distinct entity, subjecting him to inter and even intra enterprise liability under the antitrust laws as the later RICO allegations also make the other defendant corporate officers liable in Medical Supply's actions against the cartel.

"In our view, in order for the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that section 1 was intended to oversee. *Copperweld*, 467 U.S. at 752, 104 S.Ct. at 2731."

*Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125 at 1136-1137 (C.A.3 (Pa.), 1995).

**The Clear Error On Standing To Charge Jeffrey Immelt**

The Tenth Circuit sanction recommendation is ill informed. Jeffrey Immelt's targeting of Medical Supply does not require his personal knowledge of the Blue Springs company but only his intent to prevent

web based hospital supply distributors from entering the market for hospital supplies. We now know from the facts averred in the Novation complaint that Medical Supply and Sam Lipari's work was the technology directly copied by GHX, LLC the incorporated agreement to restrain trade between Jeffrey Immelt, GE and their hospital supplier competitors.

In fact Jeffrey Immelt's personal targeting of Medical Supply would not be relevant to whether Medical Supply has standing to sue Jeffrey Immelt of GE. Antitrust standing requires more than the "injury in fact" and the "case or controversy" required by Article III of the Constitution. *Todorov*, 921 F.2d at 1448. Rather, the doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545, 103 S.Ct. 897, 912, 74 L.Ed.2d 723 (1983). See also *Todorov*, 921 F.2d at 1448 ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."); PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW p 334.2 at 409 (1993 Supp.).

A two-pronged approach is followed in deciding whether a plaintiff has antitrust standing. *Municipal Utils. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1499 (11th Cir.1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. This determination is predicated on the "target area test." *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). The 1L Clear error of the Tenth Circuit law clerks assisting in drafting the opinion of the Tenth Circuit panel is that Medical Supply had to be personally targeted. This is contrary to 100 years of antitrust law and subsequent RICO case law which is also based on proximate cause. Medical Supply was clearly the Web based independent distributor of hospital supplies targeted by the illegal combination and conspiracy which the complaint alleges Jeffrey

Immelt is the architect of. The target area test merely requires that an antitrust plaintiff both "**prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry**" and that he is "**the target against which anticompetitive activity is directed.**"

*National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir.1984), cert. denied sub nom., *Patterson v. Buena Vista Distribution Co.*, 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). **Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market.** *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909, *Florida Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372 at 1374 (C.A.11 (Ala.), 1997).

This well established concept has been part of Tenth Circuit antitrust jurisprudence for a considerable period of time before our circuit's recent succession from US Antitrust law when hospital supply issues are raised:

"*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir.), the court had before it a motion to dismiss granted by the trial court. The appellate court reversed, holding that plaintiff was 'within that area of the economy which is endangered,' and was within the 'target area of the illegal practices' of the defendant."

*Nationwide Auto Appraiser Service, Inc. v. Association of Cas. & Sur. Companies*, 382 F.2d 925 (C.A.10 (Okla.), 1967).

Jeffrey Immelt's antitrust felonies not only hit Medical Supply but were clearly aimed at web based independent hospital supply distributors on Medical Supply's model to preserve his cartel's illegally inflated hospital supply prices. Under the "target area" test. See, e.g., *In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2d at 127-30 (rejecting the "direct/remote injury" test and embracing the "target area" approach). The target area rule confers standing if the plaintiff was within the target area of the defendant's illegal practices and was not only "hit", but also "aimed at." *Karseal v. Richfield Oil Corp.*, 221 F.2d 358, 362 (9th Cir.1955).

Discussing what it meant by "target area," the court, in *Karseal*, referred to it as a factor in determining whether there was proximate causation. At two places in that opinion, there is language indicating that one was not in the "target area" unless he was "aimed at" by the conspirators.

But in using the words "aimed at" the *Karseal* court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators,

plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy. This is made clear by the court's quotation, in *Karseal*, of this excerpt from the opinion in *Conference of Studio Unions v. Loew's Inc.*, 9 Cir., 193 F.2d 51, 54-55:

"A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

See generally, *Twentieth Century Fox Film Corporation v. Goldwyn*, 328 F.2d 190 (9th Cir., 1964).

A plaintiff satisfies this standard by being "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir.1973), cert. denied sub nom., 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974). The key to meeting this burden is a demonstration that the plaintiff suffered the type of core injury that Congress sought to prevent by enacting the antitrust laws. *Solinger v. A & M Records*, 586 F.2d 1304, 1311 (9th Cir.1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). See also 2 Areeda & Turner, Antitrust Law p 334d at 166 (1978). The Supreme Court refined these principles in *Blue Shield of Virginia v. McCready*, --- U.S. ----, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). The court held that when "faced with a claim that an injury is too remote from the alleged violation to warrant Sec. 4 standing", a court must look to (1) the nexus between the injury and the statutory violation, and (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute. Id. 102 S.Ct. at 2548.

The Tenth circuit has limited standing to some potential plaintiffs that are too remote, such as employees injured in their employment, while reemphasizing that buyers and sellers in the monopolized markets like Medical Supply always have standing. This circuit laid out the test for standing under the antitrust laws in *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497 at pg. 500 (10th Cir. 1978). To establish standing to maintain a private antitrust action in this Circuit, a plaintiff must meet a two-pronged test. First, he must allege injury to his "business or property" within the meaning of the Act and, second, he must show proximate causation that the injury directly resulted from a violation of the antitrust laws.

The Tenth Circuit expanded on the second prong of the *Farnell* test in *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), Cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973). The aggrieved party must satisfy the "by reason of" and/or "by" requirements found in (the antitrust statutes). This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws. *Id.* at 731.

In *Reibert*, the Tenth Circuit concluded that **buyers and sellers in the defendants' market** are within the target of the antitrust laws. The Tenth circuit panel that remanded the GE action back for sanctioning Medical Supply and its counsel are of course immune but the GE defendants are not if they seek to sanction Medical Supply or its counsel for being correct in charging Jeffrey Immelt under US law.

“While there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the First Amendment...In summary, we hold that when the basis for immunity is the right to petition, purely private threats of litigation are not protected because there is no petition addressed to the government.”

*Cardtoons v. Major League Baseball Ass'n*, (en banc) 208 F.3d 885 at 893 (10th Cir., 2000).

Medical Supply made a counter offer to the GE defendants' unlawful threat. Medical Supply will accept four hundred and fifty million dollars and the Blue Springs, Missouri office building ( both of which are state law contract damages) if delivered in thirty days to Medical Supply release GE and Jeffrey Immelt from their liability in this action.

## CONCLUSION

Whereas the plaintiff has demonstrated the unlawfulness of the defendants' threats of sanction. Medical Supply respectfully requests that the court take notice of this continued intimidation and harassment. Medical Supply further requests that the court require the defendants raise any and all issues regarding the consolidation of actions in the above captioned cases as pleadings on the record of both actions.

Respectfully Submitted

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**Certificate of Service**

I certify that on August 29<sup>th</sup>, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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